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No. 1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BRYANT CHUCKING GRINDER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Appendix E to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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160 NLRB No. 125 D-8681
Springfield, Vt.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-4037

BRYANT CHUCKING GRINDER COMPANY

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) LOCAL 218

DECISION AND ORDER

On June 4, 1965, Trial Examiner Fannie M. Boyls issued her Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs. The Respondent also filed a brief in answer to the General Counsel's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[1] Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs, adequately present the issues and positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[3] conclusions, and recommendations of the

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[2] Initially, the Trial Examiner ruled that witnesses called by the General Counsel for the purpose of authenticating their signatures to authorization cards could not be cross-examined as to the circumstances under which their signatures were obtained. Instead, she ruled that Respondent would have to take such witnesses as its own if it wished to establish the existence of fraud, coercion, or misrepresentation such as to invalidate their cards. Respondent appealed to the Board which, on August 4, 1964, reversed the rulings of the Trial Examiner and directed that Respondent should be permitted to cross-examine General Counsel's witnesses as to the circumstances under which they signed the authorization cards. Upon the resumption of the hearing, the Trial Examiner ruled that while Respondent would be permitted to undertake such cross-examination, it would not be permitted to ask leading questions of such witnesses until it became clear that they were hostile to the Respondent or that their recollection of the circumstances under which they had signed authorization cards were exhausted. We believe that her ruling imposing a conditional limitation on the use of leading questions was within the scope of her discretion and was not erroneous.

[3] The spelling of Foreman Ray LaMire's name is hereby corrected wherever it appears in the Trial Examiner's Decision. The Respondent correctly points out that a stipulation regarding the genuineness of the signatures on the authorization cards was obtained on the second, rather than the first day of the hearing, and that it appealed to the Board from a ruling of the Trial Examiner on July 29, 1964, rather than on July 27. We correct the Trial Examiner's Decision in these respects without further comment since they do not affect either her or our substantive findings.

Trial Examiner, with the following additions and modifications.

1. We agree with the Trial Examiner that the complaint should not be dismissed, insofar as it alleges a violation of Section 8(a)(5) of the Act, because of delay in its issuance by the General Counsel. The record shows that at about the time the charge was filed in this case, another case was pending before the Board [4] which presented the issue whether the Board would continue to follow the doctrine of *Aiello Dairy Farms* [5] that a union which had gone to an election should be held to have waived its right to assert that an antecedent refusal to bargain violated Section 8(a)(5) of the Act.[6] The General Counsel believed, correctly as it turned out, that the Board might determine to overrule the *Aiello* doctrine. In these circumstances, it was reasonable for the Gen-

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[4] *Barker's East Main Corp.*, 142 NLRB 1194.

[5] 110 NLRB 1365.

[6] A letter from General Counsel Ordman to counsel for the Respondent explaining the delay in the issuance of the complaint was made a part of the record in this case. Therein, the General Counsel states that shortly after the Union filed its request for review of the Regional Director's refusal to issue a complaint on its Section 8(a)(5) allegation, another case prosecuted by the General Counsel was pending before the Board raising the same issue. See, *Barker's East Main Corp., supra.* The decision of the Board in that case was interpreted by the General Counsel as an indication that the Board would overrule the *Aiello* case. The General Counsel further stated in the above letter that he selected a few representative cases in which to present this issue to the Board which, as he anticipated, overruled *Aiello.* See, *Bernel Foam Products Co., Inc.*, 146 NLRB 1277. He then authorized the issuance of complaints alleging violations of Section 8(a)(5) in this and other cases involving this issue.

eral Counsel to await the outcome of the "lead" cases before proceeding with this case. Indeed, if the enforcement of the important rights involved herein were to be uniformly applied and not to turn on the haphazard selection of cases by the General Counsel to test the disposition of the Board to sustain an 8(a)(5) allegation in these circumstances, the General Counsel had no choice but to handle the instant case as he did. The only alternative was to issue a complaint on every such charge and to litigate it fully, despite the hazard that the Board might subsequently decide against the principle on which those cases were based and dismiss all those complaints.

The Board has not heretofore sought to require the General Counsel to follow the latter course. It could prove to be an unduly burdensome and costly case-handling procedure for the parties as well as this Agency. We do not deem it wise to require it now, as our dissenting colleague urges. Section 3(d) of the Act confers upon the General Counsel the final authority with respect to the issuance of complaints, and we perceive no abusive exercise of that discretion here. The delay that resulted from awaiting the decision in the *Bernel* case, like the delay in the later stages of the instant decision, was largely a consequence of the time required for the decision-making procedure at the Board's level.

Our decision finding no merit in this exception of the Respondent is further supported by the absence of a showing that Respondent suffered any prejudice as a result of the delay in scheduling the hearing in this case. We find without merit the Respondent's contention that the principle of *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, should not be applied retroactively in this case. Even where a party has

been led into unlawful conduct by a reasonable reliance on then-existing Board doctrine, the Board has, with court approval, changed prior rules or holdings retroactively where the overriding policies of the Act so require.[7] But here, the Respondent cannot claim to have relied on the rule of the *Aiello* case either in declining to recognize the Union on August 17, 1962, or in its subsequent violations of Section 8(a)(1) of the Act, for even under *Aiello* the Union could have withdrawn its petition at any time prior to the election on November 1, 1962, and filed the charge that initiated this proceeding. Thus, there is no basis whatever for objecting to the application of the new Board doctrine.[8]

2. The Trial Examiner found, and we agree, that Respondent unlawfully interrogated 41 of its employees through 7 of its supervisory personnel and made various threats of reprisal against its employees.

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[7] See *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 534-5 (C.A. 2). Compare *N.L.R.B.* v. *E & B Brewing Co., Inc.*, 276 F. 2d 594 (C.A. 6), cert. denied 366 U.S. 908.

[8] See *N.L.R.B.* v. *National Container Corp., supra*, 211 F. 2d at 535, making the same point in a similar context. We note, moreover, with respect to the argument of our dissenting colleague, that the fact that our decision in *Bernel Foam*, reversing the rule of *Aiello*, did not issue until May 4, 1964, did not prompt the Board majority to withhold remedial orders to cease and desist from refusing to bargain and requiring future bargaining either in *Bernel*, where the refusal to bargain was found to have occurred on November 12, 1962, or in such cases, following the rule in *Bernel*, as *S.N.C. Manufacturing Co.*, 147 NLRB 809, enfd. 352 F. 2d 361 (C.A. D.C.), cert. denied 382 U.S. 902, where the refusal to bargain was on March 5, 1963, or *The Colson Corporation*, 148 NLRB 827, enfd. 347 F. 2d 128 (C.A. 8), cert. denied 382 U.S. 904, where the refusal to bargain was on January 8, 1963.

3. The Trial Examiner also found, and we agree, that Respondent unlawfully interfered with the rights of its employees under the Act when it announced improvements in its pension plan on October 9 and 10, 1962, and when it announced further improvements in pension benefits on October 29, 1962.[9] As pointed out by the Trial Examiner, Respondent had in the past made improvements in pension benefits independent of increases in the general wage level. Thus, the announcement of pension improvements on October 9, 1962, cannot be considered to have been a part of the regular October wage increase granted to employees in past years. Moreover, these improvements were not to become effective until January 1, 1963, well after the scheduled date of the election. Respondent chose to announce further improvements in pension benefits in a series of mass meetings of employees just 2 days before the November 1, 1962, election. This series of specially timed announcements convinces us that they were designed to, and did, interfere materially with, the organizational rights of its employees in violation of Section 8(a)(1) of the Act.[10]

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[9] On October 9, 1962, the Company announced a general increase in monthly pension payments by 30 to 40 cents for each year of credited service with the company and the introduction of a joint and survivor option. On October 29, it announced the following additional benefits: (1) Reduction of the length of service required for eligibility for disability retirement from 15 years to 10 years; (2) increase in minimum pension payments for certain automatic retirees from $24 to $28; (3) increase in pensions payable to employees terminated before becoming eligible for full pension by giving them credit for service performed before they attained age 30; (4) increased double pensions payable to certain early retirees in relation to their eligibility for social security.

[10] *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405.

4. We agree with the Trial Examiner's findings that Respondent's refusal to bargain with the Union on August 17, 1962, violated Section 8(a)(5) of the Act. The Trial Examiner correctly found that a clear majority of the employees in an appropriate unit [11] had validly designated the Union as their bargaining representative when the Union made its demand for recognition. Respondent's subsequent unfair labor practices, designed to induce employees to abandon their support for the Union, demonstrated a rejection of the collective-bargaining principle and give rise to the inference that its initial refusal to bargain was not in good faith.[12] Moreover, while a Board election is normally the best method of determining whether or not employees desire to be represented by a bargaining agent, where, as here, an employer engages in unfair labor practices which make impossible the holding of a free election, the Board has no alternative but to look to signed authorization cards as the only available proof of the choice employees would have made absent the employer's unfair labor practices.[13]

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[11] We agree with the Trial Examiner that the Respondent is estopped in this proceeding from relitigating the scope of the appropriate unit and from making contentions with respect to the unit which it could have raised with the Regional Director in the underlying representation case. Thus, we affirm the findings of the Trial Examiner with respect to appropriateness of the unit of approximately 337 employees, and excluding those employed by Respondent's computer division.

[12] *Joy Silk Mills Inc.* v. *N.L.R.B.*, 175 F. 2d 732 (C.A. D.C.)

[13] See, *New England Liquor Sales Co., Inc.*, 157 NLRB No. 16; *Ben Corsen Mfg. Co., et al.*, 112 NLRB 323, 342.

Further, even if the record had warranted the conclusion, contended for by the Respondent, that it relied, in refusing to bargain with the Union, on a *bona fide* doubt of the Union's majority, effectuation of the policies of the Act would still require a remedial order directing the Respondent to bargain with the Union upon request, in order properly to remedy the Respondent's other unfair labor practices here found.[14] The record establishes that the Union had a clear majority when the Respondent began its course of unfair labor practices directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the Respondent's unfair labor practices. Therefore, we shall order the Respondent to bargain, upon request, with the Union both to remedy its violation of Section 8(a)(5) and its violations of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Bryant Chucking Grinder Company, Springfield, Vermont, its officers, agents, successors,

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[14] *Editorial "El Imparcial" Inc.* v. *N.L.R.B.*, 278 F. 2d 184 (C.A. 1); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F. 2d 575, 591-2 (C.A. 3), cert. denied 364 U.S. 933; *D. H. Holmes Co. Ltd.* v. *N.L.R.B.*, 179 F. 2d 876, 879-80 (C.A. 5); *N.L.R.B.* v. *Delight Bakery Inc.*, 353 F. 2d 344 (C.A. 6); *N.L.R.B.* v. *Calderea*, 209 F. 2d 265, 268-9 (C.A. 8). Cf. *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2).

and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[15]

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein by the Board.

Dated, Washington, D.C. Oct. 4, 1966

FRANK W. MCCULLOCH, Chairman

SAM ZAGORIA, Member

National Labor Relations Board

(SEAL)

[15] The telephone number for Region 1, appearing at the bottom of the Notice attached to the Trial Examiner's Decision, is amended to read: Tel. No. 223-3358.

Member Jenkins, dissenting in part:

I agree generally with the conclusions and remedial order recommended by the majority. However, I disagree with their reliance on the Board's decision in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, because I think this case should have been decided under the pre-*Bernel* rules under which it normally would have been determined.

Briefly, the Union requested recognition as bargaining representative on August 14, 1962, and on August 16, before receiving any reply, filed a petition for an election. The Employer was notified of the petition for election and on August 17 refused to grant recognition, stating that its policy was to have a union's majority status determined by a Board-conducted election. It is clear from the record that the Union's request for recognition was *pro forma*, that it intended to proceed to an election, and that it so informed the employees when it solicited union authorization cards. An election was held on November 1, 1962, which the Union lost. The Union filed objections to the election and on December 18, 1962, the Regional Director set aside the election. Thereafter, the Union withdrew its petition for an election and on January 3, 1963, the Union filed charges alleging preelection violations of Section 8(a)(1) and alleging that Respondent's refusal on August 17 to grant recognition and bargain violated Section 8(a)(5).

Thereafter, the Acting Regional Director, apparently relying on *Aiello Dairy Farms*, 110 NLRB 1365, refused to issue a complaint on the refusal to bargain charge and entered into an agreement with the Respondent settling the alleged violations of Section 8(a)(1). The Union refused to join the settlement and

appealed to the General Counsel in Washington. There the case rested for some 15 months. Then, on May 22, 1964, the General Counsel sustained the Union's appeal and on June 5, 1964, issued the complaint herein relying on the authority of the Board's decision in *Bernel Foam Products Co., Inc., supra*, which issued on May 4, 1964.

The majority considers that the 15-month delay by the General Counsel was "reasonable" and that he "had no choice" except to handle the case as he did. I do not agree.[16]

Simply stated, the applicable rule at the time of the Union's appeal to the General Counsel was that where a union proceeds to an election with knowledge of an employer's unfair labor practices, it waives the right to proceed thereafter on a refusal to bargain charge predicated on conduct occurring before the election. Therefore, on the basis of the rule *existing at the time* of the appeal, the charge would have been dismissed.

Where the Board revises, or has indicated that it may be willing to revise, an existing rule, some modest degree of delay in pending cases may be appropriate to obtain uniformity and effectiveness in the application of the revision,[17] and I am sure such considerations weighed with the General Counsel. To extend this tolerance of flexibility or reasonable judg-

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[16] As the General Counsel is the final authority in determining whether to issue complaints, my comments and conclusions are limited to the *impact* of his actions on the case before us.

[17] Where appropriate, I have found that conduct lawful at the time of its occurrence may later be found by the Board to be unlawful because of a reversal of Board precedent.

ment to include a delay of 15 months implies, however, that the General Counsel has almost unfettered discretion in the future to withhold or delay action in every case in which his informed judgment indicates the Board may be persuaded to change its views.

I recognize that the General Counsel was faced with what may have seemed the even more unpalatable alternative of litigating every such case to a conclusion, at considerable expense and effort to the parties and the Government, in order to determine whether or when the Board would apply the new rule. I recognize also that the General Counsel's delay was in some measure attributable to the Board's own unavoidable delay in the decisional process culminating in *Bernel*. These factors, however, must be evaluated against the "reasonable dispatch" requirement of Section 6(a) of the Administrative Procedure Act, and the policy expressed in Section 10(b) of our own Act against processing of stale charges. Delays of this character in the administrative process are unfair and unduly burdensome to the parties. Pendency of litigation and uncertainty as to its outcome may interfere with the planning and performance of operations. Lapse of time obscures the facts and makes them more difficult (and expensive) to ascertain. On balance, therefore, I think the proper disposition of this case is to apply the "before *Bernel*" rule to the preelection misconduct of the employer in this case, and I would dismiss the complaint as to those violations.

I concur with my colleagues in finding post-election violations of Section 8(a)(1) of the Act, and agree that a bargaining order is the appropriate remedy for those violations.

Dated, Washington, D. C. Oct. 4, 1966

HOWARD JENKINS, JR. Member
National Labor Relations Board